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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER PACHECO,

Defendant and Appellant.

C061893

(Super. Ct. No.
SF109459A)

Defendant Javier Pacheco was sentenced to six years in state prison following a plea of no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and the admission of three prior prison terms. He appeals, contending the trial court erred by including a \$491.25 drug program fee (Health & Saf. Code, § 11372.7) in the sentencing minute orders and the abstract of judgment which was not orally pronounced by the court in defendant's presence. The People concede the error and seek remand for a hearing on whether defendant has the ability to pay the drug program fee.

We agree the trial court erred, but disagree that remand is necessary. Instead, we shall strike the fee because it was not imposed at sentencing and otherwise affirm the judgment.

The facts of defendant's offense are not relevant to this appeal.

Generally, where there is a discrepancy between the oral pronouncement of judgment and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Because the \$491.25 drug program fee was not orally pronounced, it is not part of the judgment and should not have been included in the sentencing minute orders and the abstract of judgment. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) We decline the People's suggestion to remand for a new hearing. We presume the trial court did not impose the drug program fee because it determined from the record that defendant did not have the ability to pay the fee. (Health & Saf. Code, § 11372.7, subd. (b).) We shall therefore direct the trial court to correct the minute orders and the abstract of judgment to delete that fee. (*People v. Mitchell, supra*, 26 Cal.4th at p. 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the sentencing minute orders and the abstract of judgment by deleting the \$491.25 drug program fee. The court

shall forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.